



OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN

W. C. MANN
ATTORNEY GENERAL

Hon. Julian Montgomery
State Highway Engineer
Austin, Texas

Dear Mr. Montgomery:

Opinion No. 0-821
Re: State's right to land once
constituting highway right-
of-way but which is no longer
needed for that purpose.

On November 8, 1939, you requested the opinion of
this department on the following questions:

1. What is the nature and extent of the
State's right and title to the right of way for a
former county road, acquired by designation as a
state highway?
2. Is the State's interest such as may be
disposed of by sale or lease for oil and gas de-
velopment?
3. Can the State of Texas, Texas Highway
Department legally hold the tracts and develop
the oil, gas and minerals thereunder?

In connection with your questions you stated:

"Prior to the creation of the State Highway
Department in 1917, all of the public roads in
Texas were laid out, built, and maintained by the
various counties. It has been our experience that
the counties in those days rarely ever obtained
deeds or easements to the right of way for such
roads."

And you further stated:

"Now, as highway construction has progressed
through the years since 1917, the Highway Commis-
sion has seen fit to rebuild some of the highways

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which formerly were county roads, on new locations, and finds itself in possession of valuable oil lands, which no longer are needed for highway right of way purposes. Many of the tracts are small isolated areas which could not be utilized by counties as a part of the county road system."

We take it from the above quoted portion of your letter that none of the tracts in question were secured by an outright deed in fee simple from the fee owner to the county or state and answer your questions on that assumption. Therefore, the most that the state could own under the circumstances would be an easement for highway purposes. Thus, when the road is closed and abandoned the right to use and occupy the land would revert to the owner free and clear of the easement and the state would have no right to retain same for other purposes, as the state never had any right to use such land except for highway purposes. The fee simple title burdened with the easement remained in the owner thereof, at the time the easement was created, his heirs and assigns. This is true whether the easement was acquired by dedication from the owner for roadway purposes, acquired by purchase of a right of way for roadway purposes, condemned under the law of eminent domain for roadway purposes, or established by prescription.

Article 3270, Revised Civil Statutes of 1925, under Title 52, "Eminent Domain", provides as follows:

"Except where otherwise expressly provided by law, the right secured or to be secured to any corporation or other plaintiff in this State, in the manner provided by this law, shall not be so construed as to include the fee simple estate in lands, either public or private, nor shall the same be lost by the forfeiture or expiration of the charter, but shall remain subject to an extension of the charter of the grant of a new charter without a new condemnation."

In the case of Calvert et al., vs. Harris County, 46 S. W. (2d) 375, decided by the Court of Civil Appeals at Galveston, wherein the defendants in a condemnation suit by the county seeking to condemn certain of his land for road purposes contended that he was entitled to the value of the minerals under the land taken, the court in overruling his contention used the following language:

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"The settled rule is that in condemnation proceedings only an easement is acquired and that such easement is all that the law requires to be paid for."

We find in Texas Jurisprudence the following language:

"Under the law of eminent domain a highway easement only is acquired by condemnation; the fee remains vested in him whose property was condemned. Also, the public right is but an easement when the roadway is dedicated by the owner or acquired by purchase or established by prescription." 21 Tex. Jur. p. 622, sec. 93, under "Highways". See also Boone et al. vs. Clark et al., 214 S. W. p. 607, Ct. Civ. App. Ft. Worth; Humble Oil and Refining Co. vs. Waggoner, 19 S.W. (2d) 457, Ct. Civ. App. case; and C. W. Neil et al. vs. Independent Realty Co. by the Sup. Ct. of Missouri, 70 A.L.R. p. 550 and annotations thereunder.

In answer to your first question, it is the opinion of this department that the state only has an easement for road right of way purposes.

For the reasons expressed in our answer to your first question your second and third questions are answered in the negative.

If we are wrong in the assumption that none of the tracts in question were deeded in fee simple to the counties or to the state, then please furnish us with copies of such deeds as you have for our construction and further opinion.

Very truly yours

ATTORNEY GENERAL OF TEXAS

By

D. D. Mahon

D. D. Mahon
Assistant

DDM:jm

APPROVED NOV 17, 1939

Gerard E. Mann

ATTORNEY GENERAL OF TEXAS

cc Mr

